

## CIVIL SECTION

### MINUTES

August 13 to 17, 2000

#### ***UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT***

An interim report was presented on behalf of the Working Group by Kathryn Sabo of the Department of Justice, Canada.

Ms. Sabo informed the Conference that no significant progress had been made with respect to the *Uniform Enforcement of Foreign Judgments Act* since the last meeting in Winnipeg. This was primarily due to the fact that the proposed *Hague Convention on Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters*, which was originally planned to be concluded at a Diplomatic Conference at The Hague in October of this year, had fallen behind schedule. If it had not, there would now probably have been a relatively completed text and we would have had the benefit of the discussions at The Hague. As a result, the issue for consideration by this year's meeting was whether we should proceed to conclude a *Uniform Enforcement of Foreign Judgments Act* or wait until the Hague project concludes.

Ms. Sabo briefly described the reasons for the delay of the proposed Hague convention and its importance to the ULC project. She reported that at the conclusion of the Special Commission of the Hague in October 1999, it was clear that there were significant problems with the draft text and significant issues to be resolved. She noted that these may impact on a *Uniform Enforcement of Foreign Judgments Act*. In February 2000, the United States suggested that the project be put on hold. In May 2000, it was decided to postpone the October 2000 Diplomatic Conference and to hold it in two parts, one in June 2001 and the second in February 2002. Although the June text would provide a good idea as to what the final result will be, no final decisions will be taken and there would be no guarantee that changes would not be made.

Ms. Sabo pointed out that the draft convention has three basic jurisdictional rules. These were general jurisdiction, which are essentially the same as those contained in the draft *Uniform Enforcement of Foreign Judgments Act*; special jurisdiction – i.e., special rules of jurisdiction for matters such as contract and torts; and prohibited grounds of jurisdiction. What was not covered by these could still be the basis of jurisdiction based on national law however because the lists of accepted and prohibited grounds of jurisdiction were so extensive it might be that there was little room left for jurisdiction based on national law. This was a major concern for the United States. If the Hague project is to succeed, there will have to be some accommodation of the U.S. position through either an expansion of the accepted basis of jurisdiction or a reduction of the prohibited grounds.

## CIVIL SECTION MINUTES

Other areas of concern were electronic commerce and authentic acts. Although a meeting of Hague representatives earlier this year in Ottawa considered this issue, the only conclusion that was reached was that the convention should contain jurisdictional rules about electronic commerce. No decision has been reached concerning authentic acts.

A number of recommendations for improvement of the draft text of the *Uniform Enforcement of Foreign Judgments Act* have been made. As well Part III, dealing with enforcement procedures, has been included in this year's draft and this will be a focus of discussion for the working group this year.

In the ensuing discussion by the delegates, a question was raised as to whether the reasons for the proposed uniform statute were as prevalent as they were when the project originated. The view was expressed that while demand for the project was not as strong as it was at the outset it still remained. Although there have been a number of decisions in the post-*Morguard* age, it was still difficult to advise clients with certainty and in any event the question of excessive damages remained problematic.

It was felt that there were three ways of proceeding. One was to maintain a close link to the Hague project and wait for that project to conclude. The second was to abandon the link to the Hague and proceed to complete a *Uniform Enforcement of Foreign Judgments Act* without further delay and without regard to developments at the Hague. The third was to proceed on our own but keeping in mind developments at The Hague.

### **Resolved:**

1. That the Report of the Working Group on a *Uniform Enforcement of Foreign Judgments Act* be received.
2. That the Working Group review the most recent draft of the *Uniform Enforcement of Foreign Judgments Act* in the light of the deliberations of the Section and prepare a revised Act, with commentaries for consideration at the 2001 Conference where the draft may be reconsidered to the extent necessary in the light of developments in relationship to the Hague Convention.
3. That the Report appear in the 2000 Proceedings. See Appendix E at page 230.

## **COMMERCIAL LAW STRATEGY – GENERAL**

A status report of the project was presented by Douglas Moen, Q.C., Ken Morlock and Hélène Yaremko-Jarvis.

## UNIFORM LAW CONFERENCE OF CANADA

Mr. Moen reviewed the history of the project and its major developments to date which have been based on the underlying premise that Canada would benefit from the development of a commercial law framework. At the 1999 meeting of the Conference the goals for the project to develop a commercial law strategy for Canada were established. These were:

1. Obtain endorsement of the Ministers of Justice;
2. Obtain funding to hire a coordinator;
3. Hire a coordinator; and
4. Advance the substantive work.

Progress has been with respect to each of these goals.

In October 1999 the Minister of Justice for Canada and Industry Canada agreed to provide annual funding in the amount of \$75,000 for two years. Subsequently each of the provinces have agreed to make a financial contribution to the project such that the total funding available is \$340,000 over a two year period. In December 1999 the Ministers of Justice approved the proposed strategy. H  lene Yaremko-Jarvis was subsequently engaged to serve as National Coordinator and she assumed that position on May 23, 2000. Ken Morlock was appointed Chair of the Steering Committee of the Commercial Law Strategy as of June 1. Finally, some progress has already been achieved with respect to the substantive aspects of the project with the introduction of legislation relating to electronic commerce in a harmonized fashion in various Canadian Provinces.

Mr. Morlock then outlined the next stage for the project. First, we must look at the initial priorities established for the project and ensure that they are still the correct ones. He reported that the Strategy Steering Committee met and the sense of the meeting was that an organized and disciplined strategy that crosses provincial boundaries is timely.

Mr. Morlock described the essential features of Ms. Yaremko-Jarvis' role as the following:

1. Develop and implement an up-to-date description of the strategy including the development of a website;
2. Develop terms of reference for work not yet commenced and identify appropriate individuals and timelines to carry out such work;
3. Develop funding proposals to seek sponsorship of various aspects of the strategy;
4. Maintain a close liaison with sponsors, academics, the legal profession and governments;
5. Promote the strategy with business and consumers;
6. Maintain a visible presence on behalf of the strategy; and
7. Serve as principal researcher.

## CIVIL SECTION MINUTES

Mr. Morlock pointed out that although the project has been expressed as having a ten year time frame, that does not mean that all of the work will be done in ten years. In fact, the work will never be done. Mr. Morlock noted that the immediate task at hand was to work at selling the project. He said that good ideas were not enough unless someone wanted the project and it was necessary to create a demand. He mentioned the vehicles that might be used in an effort to sell the project to volunteers, lawyers and academics.

Mr. Morlock noted that at the June 2 meeting, an attempt was made to identify priorities. In doing so, the following were the guiding principles:

1. There were two different kinds of commercial law – firstly, there is commercial law which orders affairs between private parties and secondly, commercial law relating to enforcement matters;
2. There is a need to identify areas where we perceive a need or demand and to assess how much effort would be required to get a finished product;
3. It is necessary to identify some projects which would be seen as winners which would make it easier to get people involved and may make funding easier to obtain; and
4. It is appropriate to keep in mind that it was not just new projects but that there are projects that have already been concluded by the ULC which the strategy should try to sell.

In the end the meeting decided to focus on the following:

1. Electronic commerce;
2. *Uniform Liens Act*;
3. Federal secured transactions; and
4. *Enforcement of Uniform Canadian Judgments and Decrees Act* and *Uniform Court Jurisdiction and Proceedings Transfer Act*.

Mr. Morlock concluded his remarks by noting that there was a need to expand the Strategy Steering Committee to include approximately ten regional representatives.

Ms. Hélène Yaremko-Jarvis then addressed the meeting. She firstly commented that the strategy adheres to the policy articulated in the 1995 Agreement on Internal Trade, one of the principles of which is to reconcile standards in the country. She noted the direct cost associated with inconsistent standards and the indirect costs arising from the loss of opportunities due to the failure of commercial law to keep pace with commercial reality as well as the loss of business to Canadians due to the decision by business people to conclude business transactions elsewhere. She said key questions were:

1. How can we justify to consumers the increased cost of goods?

## UNIFORM LAW CONFERENCE OF CANADA

2. How can we accept the cost of duplication? and
3. How can we accept the cost to Canadians of the loss of business opportunities?

Ms. Yaremko-Jarvis described her immediate action plan as follows:

1. Reaffirm the importance of jurisdictional representatives;
2. Work to identify and meet with stakeholders;
3. Meet with government; and
4. Raise the profile of the ULC and the Commercial Law Strategy among business and academics.

She felt that all of this may assist in funding and obtaining volunteers. She stated that she would like to hear about people that she should contact. She has already contacted the Deans of the law schools in an attempt to identify potential academics. She plans to meet with consumer groups. Ms. Yaremko-Jarvis stated that she will work to maintain the relationship between the executive and staff of ULC with the executive and staff of the National Conference of Commissioners on Uniform State Laws.

In terms of substantive work, her priorities were to see the speedy enactment of electronic commerce legislation and the *Commercial Liens Act* as well as legislation relating to federal secured transactions. On the enforcement side, she would work to see the enactment of the *Uniform Enforcement of Canadian Judgments and Decrees Act* and the *Uniform Court Jurisdiction and Proceedings Transfer Act*.

In her concluding remarks, Ms. Yaremko-Jarvis stated that it was important to work towards harmonization as much as possible while recognizing Canada's two distinct legal systems.

In the discussion that followed the presentation, and in particular in response to questions raised by Ms. Yaremko-Jarvis in the conclusion of her report, it was noted that it was essential to recognize the bi-jural nature of the country, both giving respect for and drawing upon the different legal systems. Overseas, Canada brings a lot of influence to the discussions because of its ability to speak with respect to both systems. While harmonization is important, it should not be harmonization at any price, there are legitimate social or other reasons for differences in the laws.

Another comment indicated that it was necessary to widen the network of experts. Deans of the business schools and business administration schools could be of assistance. It is important to give a positive message about the project and the state of commercial law in Canada. It should not be that it is terrible but rather how can we take steps to improve our federal system.

## CIVIL SECTION MINUTES

The importance of differences was noted. Harmonization does not equal uniformity; we are talking about creating a structure in which to do business but not telling people how to do business. The key elements included:

1. A commitment from the necessary stakeholders to the end product of adoption and implementation;
2. Involvement of a consultative process;
3. Clarification and identification of expectations for contributions in advance; and
4. The ULC maintaining a leadership role.

The project must reflect both legal systems of Canada and the message which we deliver must be a positive one. We must seek practical solutions, must have regular and frequent meetings.

It is important to try to package in themes. Support was expressed for including ICSID in the judgments package. Support was expressed for including both the *Uniform Enforcement of Canadian Judgments and Decrees Act* and the *Uniform Court Jurisdiction and Proceedings Transfer Act* as well as the *Uniform Liens Act*.

The question was raised as to how federal security interests and the PPSA fit into the Strategy generally. It was not clear what should be done with regards to federal security interests, however, work on the *Bank Act* security, and security interests in intellectual property would be popular. Concern was expressed about including in the Strategy projects such as the *Bank Act* which we could not control. The consensus was that the PPSA is not a short term priority as it was not something that would generate much interest. No immediate work is required in the area of electric commerce. The discussion concluded with the consensus that the immediate priorities were to push implementation with an emphasis on enforcement, cost of credit, commercial liens and electronic commerce.

Alberta has included cost of credit disclosure provisions in its recently enacted *Fair Trade Act*. The response from industry has been to the effect that the legislature has “got it right.” Ontario plans to enact legislation which have the relevant provisions set out in regulations. British Columbia has recently introduced legislation as well. There is a need to ensure uniformity now.

Reference was made to the seven questions raised by Ms. Yaremko-Jarvis. Suggestions were made for raising public awareness and interest. There is a need for the steering committee to identify volunteers including academics and practitioners. It was felt that in order to attract volunteers there would be a need that they would receive appropriate recognition. This is particularly important for academics. The discussion concluded with comments that it was important to identify possible impediments to the strategy.

**Resolved:**

1. That the progress Report be received and that the Uniform Law Conference supports the continued development of a commercial law framework for Canada.
2. That the Section expresses its gratitude to Douglas Moen, Q.C. for his efforts in launching the Commercial Law Strategy.
3. That the Section expresses its thanks to Ken Morlock for agreeing to assume the responsibility for the future direction of the Strategy as chair of the project's Steering Committee.
4. That the Report of the National Co-ordinator appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix J at page 445.

**COMMERCIAL LAW STRATEGY – ELECTRONIC COMMERCE**

A report was delivered by John Gregory of Ontario, setting out the status of the *Uniform Electronic Commerce Act* after its first year.

The question of the possibility of future work in relation to electronic commerce was examined. In terms of consumer protection, a federal-provincial agreement was reached on principles last year and the question arises as to whether or not the ULCC has a role to play in the continuing work. In this regard it was noted that the various jurisdictions will probably want to move more quickly than the ULCC can. The agreement appears to be built on the uniform Act.

The question was raised as to whether we should be doing anything with respect to public key infrastructure (PKI) security. Bill C-6 says certain signatures may be done electronically if secure, this is to be defined by regulation but there are presently no regulations.

The question was also raised should we be doing work on a Uniform Computer Information Transactions Act. The project in the United States has been mainly focused on licensing arrangements and it has proven to be highly controversial. The consensus of the Section was that we should not proceed with a Canadian UCITA.

With respect to PKI, on the issue of whether we need legislation on certification authorities, it was noted that the Federation of Law Societies is working on a system for certification of signatures within the legal profession.

A discussion was also held respecting drafting issues that arise in the preparation of legislation that must bridge differing legal cultures.

## CIVIL SECTION MINUTES

### **Resolved:**

1. That the Status Report on the *Uniform Electronic Commerce Act* prepared and presented by John Gregory be received.
2. That the Uniform Law Conference commends Mr. Gregory for keeping developments on this topic under review and for the materials he has provided to us.
3. That the Report appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix L at page 447.

### **COMMERCIAL LAW STRATEGY – FEDERAL SECURITY INTERESTS**

A report was presented by Mr. Bradley Crawford, Q.C. and Ms. Nathalie Des Rosiers of the Law Commission of Canada (LCC). They noted that a report had been presented the previous year by the then President of the LCC, Professor Rod Macdonald, which included the Commission's then current views and the opinion of Professor Scott concerning constitutional issues. At this year's meeting, a research study and report prepared by the firm of Fraser Milner Casgrain at the request of the Law Commission of Canada was reviewed. Although the Conference does not wish to pursue all of the issues raised in the Fraser Milner Casgrain report, the report identified key areas that required reform.

Singled out for special comment were Bank Act security, security over railway property and security over intellectual property. In each case the legislation is deficient. The Bank Act has not kept pace with commercial developments. It unduly emphasizes title, is uncertain in its relation to provincial legislation, lacks scope and detail - covering only certain property and certain people.

With respect to railways, the legislation lacks a coherent priority regime, there is no guarantee of validity of documents, and the registration machinery is deficient. Intellectual property legislation does not concern itself with security. The law is unclear, giving uncertain priority and there is no searchable registry.

The conclusions were that:

1. The federal system provides no consistent approach;
2. The federal system is deficient and must continue to rely upon the provincial systems; and
3. The registry systems are wholly inadequate.



## UNIFORM LAW CONFERENCE OF CANADA

The report canvassed various options for reform including a Federal PPSA and a statute-by-statute approach and identified some features that any reform measure should embody. The LCC will consider how to disseminate the Fraser Milner Casgrain report and try to identify who should be consulted.

### **Resolved:**

1. That the Progress Report delivered on behalf of the Law Commission of Canada be received.
2. That the Uniform Law Conference endorses and welcomes the efforts of the Law Commission of Canada carrying forward this topic as part of the Commercial Law Strategy.
3. That the Uniform Law Conference of Canada requests that the Law Commission of Canada:
  - (a) as its work on this topic moves forward, take into account the Conference's comments, suggestions and deliberations; and
  - (b) maintain a close liaison with the National Co-ordinator of the Commercial Law Strategy.
4. That the Progress Report appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix K at page 446.

### **COMMERCIAL LAW STRATEGY – *UNIFORM SALE OF GOODS ACT***

A comprehensive report prepared by Professors Jacob Ziegel and Anthony Duggan was presented by Professor Ziegel. Professor Ziegel identified his task as assisting the ULC in determining whether and how the *Uniform Sale of Goods Act* should feature in the Commercial Law Strategy.

Professor Ziegel noted that sales law occupies a central role in our economy. He traced the evolution of sales law in the various jurisdictions starting with the United Kingdom. He noted that in England there had been slow developments until the industrial age and then a very rapid development leading to the enactment in 1893 of the *Sale of Goods Act*. This became the model for the *Sale of Goods Acts* in all of the common law provinces where it continues to apply with only modest changes.

## CIVIL SECTION MINUTES

In England there have been substantial changes since the end of the second world war. There have been ten major legislative developments since 1954. Some of these have been more significant in terms of consumer legislation than others. England is now considering the enactment of an entirely new *Sale of Goods Act*.

The Australian experience has been similar to Canada. It is based on the common law in a federal context and has adapted overseas legislation to meet the local needs. Australian changes have concentrated in the area of consumer legislation and defective products.

Developments in the United States diverged very early on from those in England. It has developed its own rules and the work of Williston did not simply copy the English Act. The *Uniform Sales Act* was only adopted by 36 states however and Article 2 of the Uniform Commercial Code was drafted to respond to a number of concerns relating to sales law. All states have adopted Article 2 which is currently under revision.

Revised article 2 was approved by the American Law Institute but met with considerable opposition at the 1999 meeting of the National Conference of Commissioners on Uniform State Laws. A task force was established to review the objections to Revised Article 2 and has now submitted new text.

Commenting on the situation in Canada, Professor Ziegel referred to the work of the Ontario Law Reform Commission in the 1970's which produced a recommendation for a revised *Sale of Goods Act*. This was referred to the Uniform Law Conference and a committee was established which in reporting back to the Conference recommended that, with some revisions, the Ontario Law Reform Commission's draft act be adopted as a *Uniform Sale of Goods Act*. No jurisdictions have enacted the *Uniform Sale of Goods Act*.

Quebec sales law applies to realty. It contains differences regarding implied warranties and imposes liability on manufacturers and wholesalers notwithstanding their lack of privity.

Professor Ziegel then referred to the work of the Hague Conference. He noted this has never attracted great support. In 1968, UNCITRAL concluded that international sales law needed reform but felt that the Hague Uniform Laws were not suitable. The subsequent Convention on International Sale of Goods in 1980 was successful. Professor Ziegel felt that the CISG could not serve as a model for a revised *Uniform Sale of Goods Act* as the CISG represented a compromise solution which reconciled a number of different legal systems.

Professor Ziegel's conclusions were as follows:

1. That the *Uniform Sale of Goods Act* should be included as part of the Commercial Law Strategy;

## UNIFORM LAW CONFERENCE OF CANADA

2. Although the *Uniform Sale of Goods Act* could provide a good base on which to work, too much time had elapsed since approval to simply go back to reenact it. He therefore recommended that a committee be established to look at the 1981 Act in light of more recent developments; and
3. Professor Ziegel suggested it was premature to be concerned about differences with Quebec law. He felt although it might seem to be a significant difference, in practice this was not problematic. If a problem did arise in the future, we could consider adopting a Canadian form of CISG for Canada.

In the discussion that followed, it was suggested that the Quebec Civil Code provisions relating to the Vienna Sales Convention should be examined to see to what extent they might be incorporated within a uniform common law statute.

### **RESOLVED:**

1. That the Report presented by Professor Ziegel be received.
2. That the Uniform Law Conference commends Professor Ziegel for the work that he and his colleague Professor Duggan have carried out to date.
3. That the Steering Committee of the Commercial Law Strategy be requested to consider further the issues raised in Professor Ziegel's Report, in the light of the deliberations of the Section, and to identify and make recommendations to the Steering Committee of the Civil Section respecting options to address them and take other appropriate steps to address them which may include the establishment of a working group.
4. That the Report appear in the 2000 Proceedings. See Appendix F on page 284.

### **COMMERCIAL LAW STRATEGY – *UNIFORM SECURITIES TRANSFER ACT***

A further report was presented to the Conference by John Gregory on behalf of Mr. Eric Spink. Mr. Gregory described the project as being in effect a Canadian version of Uniform Commercial Code Article 8 regulating the transfer of property in securities. The need arises because of the greatly enhanced speed of transfer. What is described as a conceptual problem with the current law becomes real when volumes become high or in the case of international transactions.

Both the United States and the European Union have dealt with the issue. The Uniform Law Conference has previously agreed on basic principles that the law should be modernized and adhere to the principles of UCC 8.

## CIVIL SECTION MINUTES

Although there has been agreement on principles, the drafting remains outstanding. Previously, drafting was to be undertaken by a consortium of drafters from Ontario, Alberta and British Columbia. Recently, the Ontario Securities Commission has become interested in the project and has expressed a desire to participate.

Mr. Gregory noted that although the Hague Conference has adopted a project in May of 2000, this primarily relates to choice of law questions.

### **Resolved:**

1. That the Report prepared by Eric Spink and presented by John Gregory be received.
2. That Mr. Spink, in conjunction with the Canadian Securities Administrators, the consortium of legislative counsel and other interested parties, be encouraged to continue work on the preparation of a draft *Uniform Securities Transfer Act* and commentaries.
3. That a draft act and commentaries, if available, be submitted for consideration at the 2001 Conference.
4. That Mr. Spink be requested to maintain a close liaison with the National Co-ordinator of the Commercial Law Strategy concerning developments in relation to this topic.
5. That policies previously adopted by the Civil Section be confirmed.
6. That the project leaders keep under review recent developments in private international law.
7. That the Report appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix M at page 448.

### **COMMERCIAL LAW STRATEGY – POSSIBLE CHANGES TO THE *CANADIAN PERSONAL PROPERTY SECURITY ACTS***

A report prepared by Professors Catherine Walsh and Rón Cuming, Q.C. was presented to the meeting by Professor Walsh.

Professor Walsh stated that there were two sources of pressure to modify personal property security legislation in Canada. The first was the approval of revisions to Article 9 of the Uniform Commercial Code in the fall of 1999 which will come into effect on a common date in 2001. There are three categories of proposals that are relevant for our consideration. The first category consists of those that already appear in the Canadian legislation. Second, are those that are not appropriate for the Canadian regime and third, are those that are worthy of consideration for implementation in Canada.

The second source of pressure was simply the passage of time. There have been considerable developments in both the case law and in commercial practices.

At this point, Professors Walsh and Cuming have considered changes that affect the interpretation, scope and conflict of laws issues.

With respect to interpretation, following Revised Article 9, it is recommended that there be a new definition to take account of electronic media. Professor Walsh explained the reference to computer programs. Also desirable is a provision that distinguishes between true leases and security leases. It is necessary to add language to the definition of purchase money security interests to allow for cross-collateralization.

With respect to the scope of the PPSAs, it is necessary to expand it and to clarify the relationship between provincial and federal law. It is also appropriate to include security interests in tort claims (except for death or personal injury). Some cases suggest confusion regarding Quistclose trust and this needs to be clarified. With respect to the conflict between provincial and federal law, examples were given regarding the *Bank Act* and maritime issues. It was proposed that with respect to maritime cases, all security interests covering registered ships and vessels be excluded.

Lastly, with respect to a conflict of laws, there are a number of issues raised but these were regarded as largely clarifying and meant to close gaps which have been noted. The adoption of the new conflicts rules in revised Article 9 is not recommended.

Professor Walsh then briefly reviewed a number of incidental issues. These included:

1. Creation of security agreements. Generic descriptions are permissible (e.g., all present and after acquired goods but a suggestion was made for deleting exempt property;
2. Provisions are needed to recognize electronic chattel paper and offer a new form of perfection;
3. Changes are necessary because of change in the bankruptcy law relating to the effective date of a bankruptcy;

## CIVIL SECTION MINUTES

4. Priority rules need to be revised to address the issues arising out of the amalgamation of corporations;
5. Provisions for the protection of debtors; and
6. Clarification is needed with respect to anti-assignment clauses.

Professor Walsh concluded her report by noting that work will continue in collaboration with the Canadian Conference on Personal Property Security Laws to promote harmonization.

In the discussion that followed the presentation of Professor Walsh's report, the issue of the relationship between Ontario and other PPSA's and the relationship between the federal and other security regimes was raised. It was suggested that both issues need to be harmonized.

It was also suggested that we should repeal the 1982 *Uniform Personal Property Security Act*. We should avoid the adoption of meaningless terms and that certain matters are better to be dealt with by electronic commerce legislation.

### **Resolved:**

1. That the Report presented by Professor Walsh be received.
2. That the Uniform Law Conference commends Professors Cuming and Walsh for the work they have carried out to date.
3. That the Steering Committee of the Commercial Law Strategy and the Steering Committee of the Civil Section explore with the Canadian Conference on Personal Property Security Law, the Personal Property Security Law Committee of the Business Law Section of the Canadian Bar Association of Ontario and other interested bodies the possibility of constituting a joint Working Group, the purpose of which would be:
  1. the preparation of uniform amending provisions to the *Canadian Personal Property Security Acts*.
  2. the creation of a *Uniform Personal Property Security Act* to replace the 1982 ULCC Uniform Act.
  3. consider ways of achieving greater harmony between the security regimes in force in Ontario, Quebec and federally with those in force in the rest of Canada.
4. That the Report appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix N at page 449.

### ***UNIFORM MEDIATION ACT***

Mr. Jerry McHale, Director of the Dispute Resolution Office of the British Columbia Ministry of Attorney General presented a discussion paper on a possible *Uniform Mediation Act*.

Mr. McHale reviewed the status of mediation across Canada and the various statutes and regulations and posed the question whether Canada should move towards a *Uniform Mediation Act*. He stated that the objective of his report was to initiate discussions.

Mr. McHale reported that there had been a substantial increase in the use of mediation. This is in part due firstly to the difficulties associated with pursuing cases in the civil courts, namely costs, delay and complexity. These difficulties create a serious access to justice issue. Secondly, from the government perspective, there is a rise in the backlog and cost associated with the operation of the judicial system. The answer is not simply building more courts and hiring more judges. These problems exist throughout the common law world. He referred to the 1996 report of the CBA Systems of Civil Justice Task Force, which stated that procedural safeguards and due process do no good if people cannot get into court. Mr. McHale reported that there is growing support in the business world. This is not just because of cost but because mediation is more likely to preserve business relationships.

In Canada, mediation is delivered in two ways. Firstly, through the private sector which he described as a voluntary and relatively unregulated system. Secondly, through court annexed mediation for which provision is made in statutes, regulations, court rules and court directives. On one level, the statutes may be nothing more than the endorsement of a process. In other instances, statutes can mandate mediation, making it compulsory. These latter statutes are more elaborate and typically deal with some or all of the following:

1. What form will the mandate take, e.g. a blanket obligation to mediate;
2. The scope, e.g. to what cases will it apply;
3. At what stage will it apply; and
4. Confidentiality - while there is a strong general rule that negotiations should be confidential, it is not clear what is covered, particularly in relation to freedom of information acts and the capacity to waive confidentiality.

If mediation is compulsory, other issues arise, such as pre-mediation disclosure and what authority will the persons attending the mediation have. As an example, the Alberta rule requires that parties negotiate in good faith. Mr. McHale noted that settlement and party satisfaction rates have been found to be almost as high in mandatory mediation as in voluntary mediation.

## CIVIL SECTION MINUTES

Another issue of importance is who is to be a mediator. There are no common standards, no codes of conduct and no requirements for qualifications nor regulation of fees. Questions regarding mediator immunity also arise.

Additional questions include how settlements are to be documented and what role the courts will play. In the United States, as regulation has increased, problems have arisen leading to pressures for uniform legislation.

Mr. McHale reviewed the case for a uniform act and cited the following as substantial reasons:

1. Mediation is beneficial and uniform legislation would hasten its acceptance;
2. Law can encourage the use and integrity of the mediation process and its relation to the court process, however, Mr. McHale also pointed out that what is valued about mediation is its flexibility and informality and law might have a negative effect. Also, law could bring premature closure on essential features that need to develop over time;
3. The proliferation of mediation statutes, conflicting requirements between states and within states in the United States are not compelling reasons in Canada but they are significant developments. Also, different developments in various common law decisions relating for example to confidentiality and mediations increasingly being used in cross jurisdiction disputes; and
4. Canada does not yet have the experience that the Americans have in legislating mediation. We are not experiencing the problems but the question is should we wait until the problems arise.

Mr. McHale concluded with the comment that it was his feeling that we should be moving to explore uniformity. Mr. John McClaugherty of the National Conference of Commissioners on Uniform State Laws noted that the major issues in the United States were qualifications and confidentiality. It was suggested that it may be premature to move to uniform legislation but it was not premature to study the issue further. Some concern was expressed that legislation in the field might undermine the process. Developments in the international setting, namely, UNCITRAL and the Hague were discussed. The European Commission is soon to release a Green Book on mediation standards.

### **Resolved:**

1. That the Discussion Paper prepared and presented by Jerry McHale be received.
2. That the Uniform Law Conference commends Mr. McHale for the work that he has carried out in relation to this project.



## UNIFORM LAW CONFERENCE OF CANADA

3. That the Steering Committee of the Civil Law Section be requested to maintain a watching brief on developments in relation to mediation and, in conjunction with the Forum on Civil Justice and other interested parties, create machinery for the dissemination of information on these developments.
4. That the Report appear in the 2000 proceedings. See Appendix C at page 180.

### REPORT ON EUROPEAN INSTITUTIONS

An informative and interesting overview of the various institutions functioning in the European Union was presented by Mr. Philippe Lortie, in particular the Justice and Home Affairs Directorate General at which Mr. Lortie recently completed an assignment. Mr. Lortie reported that developments are occurring very quickly in Europe in this new area. Mr. Lortie also reported on the Justice and Home Affairs “Score Board” and gave us a flavour of the wide range of initiatives contemplated therein for the next four years especially in the area of judicial co-operation in civil matters. Finally, Mr. Lortie indicated that Canada and the European Union could learn from each other in this area as they both have experience in the co-existence of different legal frameworks based on the civil law and the common law traditions in what is sometimes referred to as “a single area of justice”.

#### Resolved:

1. That the Uniform Law Conference thanks Philippe Lortie for his thoughtful and informative presentation.

### REPORT FROM NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

Mr. John McLaugherty, President of the National Conference of Commissioners on Uniform State Laws, reported on the activities of NCCUSL over the past year.

Mr. McLaugherty reported that at its recent meeting held at St. Augustine, Florida, six acts were considered for the first time but only two, *The Uniform Partnership Act* and *The Uniform Health Care Information Act* were given first reading. As well Revised UCC 2 relating to sales and UCC 2A were given second reading.

The presentation of UCC 2 was problematic last year and a new drafting committee had been appointed. Although substantial progress had been made, the American Law Institute was unhappy that the original draft had been recalled. It was felt that they could not run the risk of not having unanimous adoption and so the Revised UCC 2 was not passed but will be considered next year.

## CIVIL SECTION MINUTES

A policy discussion was held on UCC 1 but it was decided not to proceed on UCC 1 until UCC2 is concluded. Also discussed were The Non-Judicial Foreclosure and Powers of Sale Act, and although it was not on the agenda, The Uniform Mediation Act. Concerns raised in the discussion concerning the latter were issues relating to privilege and confidentiality.

The following eight Acts were approved for enactment or amendment:

1. *The Revised Uniform Arbitration Act;*
2. *The Uniform Interstate Enforcement of Domestic Violence Protection Orders Act;*
3. *The Revised Uniform Parentage Act;*
4. *The Uniform Athlete Agents Act;*
5. *The Uniform Money Services Act;*
6. *The Uniform Trust Code;*
7. Amendment to the *Uniform Computer Information Transactions Act;* and
8. *Uniform Principal and Income Act.*

Two new drafting committees were formed. The first was to consider amendments to *The Uniform Interstate Family Support Act* and the second was to consider amendments to UCC Article 7.

At its midwinter meeting last year, the Conference approved the establishment of drafting committees to consider procedures for obtaining and preserving the testimony of minors and an act to facilitate the conversion or merger of business organizations. A special committee to study taxation of international sales was also formed. Drafting committees have been formed with respect to UCC Articles 3, 4 and 4A and a study committee was formed concerning misuse of genetic information.

The Conference has also authorized reconstitution and expansion of three committees. These were the Joint Committee for Cooperation Between the ULCC and NCCUSL, the Liaison Committee with Federal Government and the Liaison Committee with the ULCC and other international organizations. Mr. McClagherty concluded with an expression of the importance of the two Conferences continuing to cooperate.

### **Resolved:**

1. That the Report be received and the Uniform Law Conference express its thanks to Mr. McClagherty for his informative presentation.

## ENFORCEMENT OF CIVIL JUDGMENTS

A report outlining the elements for the development of a *Uniform Enforcement of Civil Judgments Act* was presented by Professor Lyman Robinson Q.C. of the University of Victoria.

Prior to the presentation of his report, Mr. Close briefly summarized the background of the project. He informed the meeting that two years ago at the Halifax meeting, Alberta and Newfoundland had jointly urged the Conference to take on a such a project. This was stimulated by their own substantial modifications to their civil enforcement regimes.

Professor Robinson noted the four areas that had to be considered. These were initiation of enforcement, recovery, exemptions, distribution. Professor Robinson stated that there were four questions that needed to be answered. These were:

1. Can the perceived problems and need for reform be confirmed;
2. Can the essential elements be identified and in doing so he proposed the following six principles:
  - i. universal exigibility;
  - ii. just exemptions;
  - iii. sharing among creditors;
  - iv. registration and integration with PPSA laws;
  - v. a single statute; and
  - vi. a minimum of judicial supervision;
3. Were the Alberta and Newfoundland reforms the appropriate starting point; and
4. What should the membership of the working group be.

Professor Robinson stated that, at least in British Columbia, the answer to the first question was yes. After reviewing his paper in detail, Professor Robinson noted two other issues that required consideration. These were the distribution of proceeds and the priority of distribution.

In the discussion that followed, the balance of commentary seemed to be in favour of establishing a regime of registrations. The consensus of the meeting, with respect to out-of-province judgments was that there be full faith and credit and direct registration. It was reported that the three years of experience in Newfoundland involved a considerable amount of work for the sheriffs, particularly in the transition phase. There are significant advantages to being able to seize other types of property, for example licenses. The Newfoundland regime is not integrated with the PPSA regime.

## CIVIL SECTION MINUTES

There have been very few problems in Alberta and few comments questioning why the change had been made. This led to the assumption that there was a high level of satisfaction.

New Brunswick, Nova Scotia and Prince Edward Island have integrated their judgment enforcement regimes with their PPSAs. A judgment is essentially deemed a security interest. The basic policy of priorities determined by registration is working well. Two problems identified in New Brunswick related to determining the identity of the judgment debtor and that for small claims the scheme was unduly onerous.

The consensus of the meeting was that the project should proceed.

### **Resolved:**

1. That the Workplan Document prepared and presented by Professor Lyman Robinson, Q.C. be received.
2. That the Uniform Law Conference commends Professor Robinson for the work that he has carried out in relation to this project.
3. That the Civil Section confirms its continuing interest in the development of Model or Uniform legislation on this project.
4. That the Steering Committees of the Civil Law Section and of the Commercial Law Strategy jointly continue to seek a jurisdictional leader to take carriage of this project and take appropriate next steps to move this topic forward including, if appropriate, the possible establishment of a Working Group in relation to it.
5. That the Workplan appear in the 2000 Proceedings. See Appendix D at page 214.

### **AMENDMENTS TO THE *UNIFORM LIENS ACT***

Mr. Darcy McGovern presented a report on behalf of the working group relating to the *Uniform Liens Act* which had previously been adopted by the Conference. The Committee had reviewed the matter and determined that certain relatively modest amendments were needed. These were as follows:

1. To make it possible to register and enforce an out-of-province lien in the same manner as an in-province lien. Mr. McGovern emphasized that this was limited to Canadian jurisdictions only;
2. The use of the words “and includes” in the definition of services suggests that there might be other services that could give rise to a lien. The proposed amendment would make the list exhaustive;

3. Section 5 should be amended to ensure that a lien claimant who does not have an enforceable lien will not gain priority over a judgment creditor; and
4. Section 8 be amended to protect the person who deals with the owner in a case where a lien is created by a person who is in possession but is not the owner by requiring that a lien with respect to non-serial numbered goods be registered against both the owner and the person requesting the service.

**Resolved:**

1. That an amended version of the *Uniform Liens Amendment Act*, in both official languages be circulated to the jurisdictions as soon as possible and, unless two or more objections are received by the Executive Director of the Conference by November 30, 2000, the Act should be taken as adopted as a Uniform Act.

No objections being received, the amendments as consolidated were approved as of March 31, 2001.

2. The *Uniform Liens Amendment Act*, as settled, be consolidated with the *Uniform Liens Act (1996)* and the consolidated Act recommended to the jurisdictions for enactment. See the Conference's web site, <http://www.ulcc.ca/en/us/>
3. That the Act and the Report of the Working Group appear in the 2000 Proceedings. See Appendix G at page 367.

**UNCLAIMED INTANGIBLE PROPERTY**

A progress report was delivered by Mr. Russell Getz. The final report and draft act with commentaries will be prepared for next year's meeting. Mr. Getz advised the meeting that the two principal outstanding issues were:

1. Rights and duties of holders and administrators - there is a need for appropriate regulations for different classes of holders who have different connections with the enacting jurisdiction. Mr. Getz noted that particular concern arises with respect to the extraterritorial effect of the legislation if there is not uniform enactment; and
2. Enforcement - the issue here is to achieve a balance to ensure that compliance is not unduly onerous.

In the discussion following Mr. Getz's report, a question was asked if there had been consultation, particularly with retailers, on the issue of gift certificates and also with respect to shares in public companies. Mr. Getz indicated that there had been such consultation. The need for such consultation was emphasized.

## CIVIL SECTION MINUTES

### Resolved:

1. That the Report of the Working Group be received.
2. That a draft Uniform Unclaimed Intangible Property Act and commentaries be prepared for consideration of the 2001 Conference.
3. That the Report appear in the 2000 Proceedings. The Report is at the ULCC's web site. See Appendix P at page 451.

### *UNIFORM WILLS AMENDMENT ACT*

A report was presented by Mr. Peter Lown, Q.C. of the Alberta Law Reform Institute.

Mr. Lown advised the meeting that section 19 of the *Uniform Wills Act* adopted by the Conference in 1987 allows the court to ignore non-compliance with the formalities of execution of a will if the court is satisfied that a will embodies the testator's intention. Although the marginal note refers to "substantial compliance", in reality, the Act contains a general dispensing power. Both types of provisions are based on the premise that we should not allow "technicalities" to exclude otherwise valid wills. There is a difference, however, between substantial compliance rule and a general dispensing power.

The 1987 report and recommendation to the Conference by the Saskatchewan Commissioners was changed at the last minute because of problems with the experience in Queensland. In a subsequent Manitoba case, the Manitoba Court of Appeal held that the Manitoba statute, on which the uniform act was modeled, should be interpreted as requiring some attempt at compliance. This requirement was removed by subsequently amending the legislation in Manitoba. In addition, the Saskatchewan courts confirmed that a dispensing power did not require any particular level of attempted compliance. Now Manitoba, New Brunswick, Prince Edward Island, Saskatchewan, and Quebec statutes contain a general dispensing power. In Australia, the statutes of all of the states except for Queensland contain a general dispensing power, as does the *Uniform Probate Code* which has been adopted by most states of the United States.

The report presented by Mr. Lown reviewed the policy and jurisprudence since the uniform act was promulgated. Consultation by the Alberta Law Reform Institute revealed that the issue arose much more often than popularly believed, heightening the need for some sort of general dispensing power. Mr. Lown posed three questions:

1. Should there be a general dispensing power?
2. What level of proof is required? and
3. What formalities may be dispensed with?

In answer to these questions the Alberta Commissioners concluded that there should be a general dispensing power and that the *Uniform Wills Act* now contains one. There should, however, be a change to the marginal note.

Although the level of proof is expressed as on the balance of probabilities, in reality this shifts as the degree of non-compliance shifts. The Alberta Commissioners recommended that a test of “clear and convincing evidence” should be required. This would be consistent with the wording in the *Uniform Probate Code*.

As to what formalities should be covered, the choice was between all or all except signature. In other words, was the requirement of signature of such a different level of significance that it should be dealt with separately? The Alberta Commissioners recommended that it should not be treated separately.

The Alberta Commissioners also recommended that:

1. The dispensing power should apply to whatever the formalities are;
2. The dispensing power should list the formalities that can be dispensed with;
3. The dispensing power should be exercised only if there is clear and convincing evidence; and
4. The evidence should be of the intention to create a testamentary document.

The Alberta Commissioners recommended that such power be implemented by implementing a rebuttable presumption that a will that does not comply is invalid. This is in accordance with recommendation 51 of the 1987 report.

In the discussion that followed, the question arose as to whether the provisions should apply to people who die before the Act comes into force. The suggestion was made that the effective date should be left to the various jurisdictions and therefore be square bracketed.

Mr. Lown reported that this feedback is that a general dispensing power was unusual and therefore should be justified by a more strict evidentiary requirement.

It was suggested in the ensuing discussion that electronic documents should be excluded. The Conference concluded that the evidentiary standard should be clear and convincing evidence and that it should extend to new forms of writing, e.g., computer, camera, video tape. This raised the question as to whether we were talking about curing defects or about different ways of creating a will. Mr. Lown said the question is how does one accommodate new media not how can we accommodate electronic wills.

## CIVIL SECTION MINUTES

### **Resolved:**

1. That the Report of the Alberta Commissioners be received.
2. That the Alberta Commissioners be requested to prepare a draft amendment in both official languages to the **Uniform Wills Act** to replace s. 19 using the draft legislation contained in the Alberta Law Reform Institute Report as a template, but subject to modification reflecting the discussions and deliberations of the Section, including commentaries containing reference to the jurisprudence in relation to the phrase “clear and convincing” and that this draft be circulated to the jurisdictions as soon as possible and, unless two or more objections are received by the Executive Director of the Conference by November 30, 2000, the provision should be taken as an amendment to the Uniform Act.
3. That the Steering Committee of the Civil Section in conjunction with the Alberta Law Reform Institute and other interested bodies be requested to develop terms of reference for a project to amend the *Uniform Wills Act* to accommodate new media and if acceptable terms of reference can be developed, that the Alberta Law Reform Institute be requested to develop materials to bring to the meeting of the Conference in 2001.
4. That the Report appear in the 2000 proceedings. The Report is at the ULCC’s web site. See Appendix Q at page 452.

### ***MODEL LIMITED LIABILITY PARTNERSHIP ACT***

Mr. Close reported that at last year’s Conference the *Limited Liability Partnership Act* was approved as a model law subject to a November 30, 2000, rule. An English language version of the Act was available in a timely fashion but problems arose in the preparation of a French language version. A decision was taken to bring the Act (in both languages) back before the Section for formal adoption, although the policy itself was settled last year. The preparation of the French language version also identified the need for two minor amendments to the English language version prepared earlier.

### **Resolved:**

1. That the draft *Limited Liability Partnership Act*, as presented to the Civil Law Section in both official languages subject to two minor drafting corrections in the English language version be adopted as a Model Act.
2. That the Act appear in the 2000 Proceedings. See Appendix B on page 164.



## **REPORT ON PRIVATE INTERNATIONAL LAW**

Ms. Elizabeth Sanderson provided the meeting with an overview of the activities of the Private International Law section of the Department of Justice.

### **Resolved:**

1. That the Report be received and published in the 2000 proceedings. The Report is at the ULCC's web site. See Appendix O at page 450.
2. That the Conference thanks Elizabeth Sanderson for her very informative presentation.

## **NEW PROJECTS**

### ***Uniform Transboundary Pollution Reciprocal Access Act***

Mr. Close outlined the background of the request to reopen the UTPRAA. The Act had been developed in the early 1980s jointly with NCCUSL. Since no further communications had been received from the parties requesting that the Act be reopened and no corresponding request had been made of NCCUSL it was concluded that no further action should be taken at this time.

### ***Uniform Pension Benefits Standards Act***

Mr. Close outlined the background of the request that the Conference add to its program a project on a *Uniform Pension Benefits Standards Act*. The meeting was then joined by Sherallyn Miller, the British Columbia Superintendent of Pensions and Chair of the Canadian Association of Pension Supervisory Authorities (CAPSA) Committee on Uniform Pension Legislation. It was decided that communications between CAPSA and the Steering Committee should be maintained with a view to establishing terms of reference for a new project on this topic once CAPSA had completed its work in relation to basic principles of uniform legislation.

## **Hague Conventions on the Protection of Adults and Children**

The Steering Committee will establish a working group to prepare uniform Acts with respect to the implementation of the 1999 *Hague Convention on the International Protection of Adults* and the 1996 *Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*.

## CIVIL SECTION MINUTES

### **UNIDROIT Convention on Interests in Mobile Equipment**

The Steering committee will consider a possible project on the implementation of the UNIDROIT Convention on Interests in Mobile Equipment.

### **REPORT OF THE NOMINATING COMMITTEE**

The meeting of the Civil Section concluded with report of the nominating committee. On the recommendation of the Committee Ms. Susan Amrud of the Saskatchewan Commissioners was unanimously elected Chair of the Civil Section.